Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. **77-1310**

OCTOBER TERM, 1977

ANTHONY RICCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
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ANTHONY RICCO,

Petitioner,

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UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Anthony Ricco, the petitioner herein, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 30, 1977.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgement of conviction in an opinion reported at 566 F. 2d 433 and set out in the Appendix, *infra*, at pp 1a-12a. The orders of the Court of Appeals denying the petition for rehearing and for rehearing en banc appear in the Appendix, *infra*.

JURISDICTION

The judgement of the Court of Appeals for the Second Circuit was entered on November 30, 1977. A timely petition for rehearing or rehearing en banc was denied on February 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the decision below raises important and substantial problems of Federal law concerning the proper interpretation of 18 U.S.C. §§2517 and 2518(8)(a)?

STATUTES INVOLVED

This case involves 18 U.S.C. §§2510(8), 2516(2), 2517, and 2518(8)(a) and New York Criminal Procedure Law §700.65(3). The pertinent text of each is set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

On June 17, 1977, petitioner was convicted in the United States District Court for the Southern District of New York of conspiracy to violate the narcotics laws, in violation of 21 U.S.C. §846, and two counts of possession with intent to distribute narcotics in violation of 21 U.S.C. §841, after a trial by jury before the Hon. Morris E. Lasker, U.S.D.J.

Judge Lasker sentenced petitioner to seven years imprisonment on the conspiracy count and on one of the substantive violations, the sentences to be served concurrently, to be followed by six years special parole. Judge Lasker suspended sentence on the remaining count and a term of five years probation was imposed. The testimony

presented by the government to establish the conspiracy and substantive offenses consisted chiefly of the testimony of two co-conspirators, Albert Rossi and Peter Mengrone.

Prior to trial Mengrone listened to tape recordings and read transcripts of conversations recorded during the course of a New York State court-authorized interception of wire communications on Mengrone's telephone, evidence of which was suppressed by Judge Lasker because of the state's improper delay in having the tape recordings sealed. *United States v. Ricco*, 421 F. Supp. 401 (S.D.N.Y. 1976). The trial court refused to exclude Mengrone's testimony as an improper use or disclosure of the suppressed communications or evidence derived therefrom.

On appeal, the judgement of conviction was affirmed by the United States Court of Appeals for the Second Circuit in an opinion dated November 30, 1977, 566 F. 2d 433 (2d Cir. 1977).

Pursuant to Federal Rules of Appellate Procedure 40 and 35, petitioner timely moved for a rehearing and a rehearing en banc, due to a misapprehension by the Court of Appeals of the meaning and purpose of the statutes involved. The motions were denied on February 15, 1978.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT AND SUBSTANTIAL PROBLEMS OF FEDERAL LAW CONCERNING THE PROPER INTERPRETATION OF 18 U.S.C. §§2517 and 2518(8)(a)

This is a case uniquely suited for review by this Court. It is the first case-to petitioner's knowledge—under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520) to decide whether refreshing the recollection of a trial witness with unsealed wiretap tapes and evidence derived therefrom prior to trial is an improper use or disclosure under §§2517(3) and 2518(8)(a), requiring suppression of that witness' testimony.

The significance of the statutory scheme to the administration of criminal justice and the importance and impact of a ruling on this substantial issue suggest the appropriateness of the granting of a writ of certiorari herein.

A. Background

On August 17, 1973, Westchester County Court Judge John C. Cousins, pursuant to New York law, signed an order permitting interception of wire communications on Mengrone's telephone through September 18, 1973. On September 18th, Judge Cousins signed a thirty day extension order. On October 18, a second extension order was signed to permit the state to continue its interceptions through November 17, 1973.

Mengrone was arrested on October 24, 1973 on a narcotics charge and the tap was terminated. Twelve days later, on November 5, 1973, Judge Cousins sealed all the original tape recordings.

Following the decision of the Second Circuit in *United States v. Gigante*, 538 F. 2d 502 (2d Cir. 1976), petitioner moved to suppress the tape recordings on the ground that they were improperly sealed. On September 28, 1976, Judge Lasker ruled that the wiretap recordings and their transcriptions were inadmissible against petitioner due to an inexcusable delay in sealing the tapes. *United States v. Ricco*, 421 F. Supp. 401 (S.D.N.Y. 1976). However, the court denied a motion to suppress the testimony of Mengrone as an improper use or disclosure of the wiretap recordings and transcripts. This motion was renewed at trial without effect (Tr. 2).*

"Prior to (petitioner's) trial, Mengrone listened to the tape recordings and read the transcripts of his conversations with his co-conspirators."** This was done to assist Mengrone in his preparation for testifying against petitioner. Such a use, petitioner contends, is an improper use or disclosure under 18 U.S.C. §§2518(8)(a) and 2517(3).

B. The Law

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520), Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. *Gelbard v. United States*, 408 U.S. 41, 46 (1971).

The relevant statute, 18 U.S.C. §2518(8)(a), provides, in pertinent part:

> The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use

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*Numbers preceded by "Tr" refer to the typewritten trial transcript.

**Brief for the U.S.A., *United States v. Ricco*, No. 77-1290 (Second Circuit), p. 11. See also, Tr 4-5.

or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

Subdivision (3) of §2517 states:

> Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

An untimely sealing has been held equivalent to the "absence" of the seal required by §2518(8)(a). *United States v. Gigante*, 538 F. 2d 502, 506-07 (2d Cir. 1976).

The Second Circuit has cogently described the role of sealing in the Title III scheme:

> Congress in enacting Title III's sharply detailed restrictions on electronic surveillance, intended to "ensure careful judicial scrutiny throughout" the process of intercepting and utilization of such evidence. *United States v. Marion*, 535 F. 2d 697, 698 No. 75-1408 (2d Cir. May 7, 1976).
> The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of this statutory scheme. Section 2518(8)(a) was intended "to insure that accurate records will be kept of intercepted communications". S. Rep. 1097, 90th Cong. 2d Sess., quoted in 2 U.S. Code Cong. and Ad. News, 2112, 2193 (1968). Clearly all of the carefully planned strictures on the conduct of electronic surveillance, e.g., the "minimization" requirement of §2518(5), would be unavailing if no reliable records existed of the conversations which were, in fact, overheard. Maintenance of the integrity of such evidence is part and parcel of the Congressional plan to "limit the use of intercept procedure to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 527, 505, 527, 94 S. Ct. 1820, 1832, 40 L. Ed. 2d 341 (1974). Moreover, it plays a "central role in the statutory scheme". Id. at 528, 94 S. Ct. at 1832. See also, *United States v. Chavez*, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed 2d 380 (1974).

Gigante, supra, at 505.

Thus, §2518(8)(a) must be viewed in pertinent part, as a mandatory, minimum custodial requirement rather than an exclusionary device. Evidence which violates this statutory safeguard cannot be used as it is legally unreliable. *United States v. Donovan*, 429 U.S. 413, 97 S. Ct. 658, 671 (1977); See also, *United States v. Gigante, supra*. The purpose of this sealing requirement is to avoid the privacy abuses resulting from electronic eavesdropping and to insure the reliability of the resultant wiretap evidence. Thus, the statute calls for continuous judicial scrutiny of the entire process of obtaining and utilizing recorded conversations. In fact, the legislative history is clear that once sealed the tapes must "be considered confidential court records." 2 (1968) U.S. Code Cong. and Adm. News at p. 2193.

Once wiretap evidence has been found inadmissible due to the absence of the required seal (or the absence of a

satisfactory explanation for the lack thereof), no "use of disclosure of the contents . . . or evidence derived therefrom . . ." may be made as part of a witness' testimony under oath in any criminal proceeding. See, 18 U.S.C. §§2517(3); 2518(8)(a).*

The prohibition against use and disclosure as set forth in §2518(8)(a) required the courts below to prohibit the government from presenting Mengrone's testimony as it was the result of his refreshed recollection, refreshed by use of the inadmissible tapes and transcripts years after the events in issue at petitioner's trial. (Such refreshing of recollection should be a prohibited use of tapes' contents or evidence derived therefrom, as being *in direct contravention of the rigid prohibition* contained in §2518(8)(a).) There can be little doubt that the opportunity to hear and read this material aided the witness in his testimony almost 4 years after the events, if not providing data to adopt in his testimony where he had no independent recollection prior to this "use".

18 U.S.C. §2510(8) defines "contents" in respect to any wire or oral communication as including "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." This includes all aspects of the communication. "The privacy of the communication to be protected is intended to be comprehensive." 2 U.S. Code Cong. and Adm. News, *supra.* at 2179.

To implement this broad intent of the Congress, it must follow that when the statute prohibits any testimonial use, no use, in any fashion, shall be made of the suppressed communications in a criminal proceeding.** Surely,

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*Once improper use of unsealed tapes is shown, the burden is on the government to show freedom from any taint. *United States v. Huss*, 482 F. 2d 38 (2d Cir. 1973); *United States v. Crouch*, 528 F. 2d 625, 629 (7th Cir. 1976).

**Where there has been no order of suppression in a case, the government could argue that there could be a chilling effect on their use of intercepted communication for trial preparation since it could not be known before judicial determination if such use was proper or not. Here, the use was post-suppression and under these circumstances the prohibition against refreshing recollection would have no unfair impact on the government's preparation. Further, the District Court's opinion only refused to suppress Mengrone's testimony, it did not permit this use. Judge Lasker held that the claim of "taint" by this use was an issue for cross-examination. 421 F. Supp. at 411. The government compounded any taint by permitting Mengrone to refresh his recollection after the District Court's ruling and prior to petitioner's trial.

employing a tape or transcript to refresh one's recollection is a use within the ordinary meaning of that word. It would strain one's credibility to maintain that the witness needed his recollection refreshed, yet gained no information on the identities of other parties or the existence, substance, purport, or meaning of the communications from the use of the tapes and transcripts that had been found legally inadmissible. Moreover, the phrase "any evidence derived therefrom . . ." is further support for petitioner's position. If Mengrone's recollection needed to be refreshed, then there must have been either gaps in his independent recollection or events that made him unsure of his recollection. By hearing the tapes and reading the transcripts, the witness could resolve these doubts and clarify his testimony without adopting the communications themselves. Yet, this also clearly violates the statute, in that his testimony was thus derived, at least in part, from the inadmissible, unreliable communications.

C. The Court of Appeals' Decision Misinterprets the Meaning and Purpose of §2517 and 2518(8)(a)

The Court of Appeals for the Second Circuit held that there was a statutory "use" of the tapes and transcripts in allowing the witness to refresh his recollection, but, since the use was prior to trial, §2517(3) was inappliable. Rather, the court held that this use was within the terms of §2517(2)

and hence not subject to the strictures of §2518(8)(a). The court held §2518(8)(a) applicable only after the trial begins.

Petitioner contends that the finding that since the use occurred prior to trial, it was nontestimonial within the purview of §2517(2) seriously misinterprets the meaning and purpose of §§2517 and 2518(8)(a). This Court should grant a writ of certiorari to correct this error of interpretation of federal law, especially where the statute involved plays a central role in the statutory scheme and was designed to protect substantial rights.

The bases for the Court of Appeal's holding are the language of §2517(3) and the legislative history, especially comments and citation appearing in the Senate Report accompanying Title III. While the language of the statute could superficially support the Second Circuit's holding, closer analysis shows that the statute should not be so artifically and mechanically construed. The result of the Second Circuit's interpretation is in conflict with the purposes of the sealing requirement and the thrust of Title III. Such a result leads to anomalies when applied. Further, the Senate Report does not support the court's holding. In fact, the Report itself indicates the correctness of a conclusion contrary to that of the Second Circuit.

The language of §2517(3), in its strictest terms, appears to limit the effect of a failure to seal tapes to a testimonial or "at trial" use. Seizing upon this language the Second Circuit has drawn an artificial line between all pretrial and trial uses. Basing this distinction on whether or not the trial has actually begun is too artificial to be the appropriate dividing point. The issue is not the timing of the refreshing, but the purpose or function it serves. When information gained by the use of unsealed tapes to refresh recollection is to be used or disclosed at trial it is of no matter when such tapes were shown to the witness. The ultimate harm remains the same—judicially unreliable tapes are used to effect the evidence presented at trial.

It has not been denied by the courts below or the government that some enhancement or addition to the witness' recollection resulted from this use. The only purpose and effect of refreshing recollection is to enable a witness, unable to remember at the time of refreshing, to use the material to aid or stimulate his recollection. While the witness then testified based on his own recollection, it is beyond dispute that without the refreshing of his recollection, his testimony would either not be the same or unavailable at trial.

The true function of refreshing recollection is not to assist the prosecutor in the preparation of his case, but to enable the witness to have a present recollection of the facts in question so he may testify at trial. According to the Second Circuit, the key is whether the use is part of the investigative phase of a case or the trial phase. The error in this analysis is that the court is too restrictive in defining the "trial" phase. The rationale behind §2517(1) and (2), as reflected by the Second Circuit's opinion in *United States v. Fury*, 554 F. 2d 522 (2d Cir.), *cert. denied*, 97 S. Ct. 2978 (1977), is to allow use and disclosure of unsealed tapes for advancing a pending investigation without rendering the fruits of the further investigation inadmissible. *Fury* permits the use of unsealed wiretaps to establish probable cause for further surveillance or searches. Any other interpretation would deny the use of available, but unsealed, information to law enforcement officials until the termination and sealing of those tapes.

However, the situation in *Fury* is far different from a use several years after termination of a wiretap and its improper sealing. Once the investigation ceases, the rationale accepted in *Fury* drops from sight.* Trial

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*Moreover, the Second Circuit conceded the issue in *Fury* was itself not free from doubt. 554 F. 2d at 532. In fact, prior to *Fury*, a distinguished jurist in the Southern District of New York noted that establishing probable cause was a use which *would* violate §2518(8)(a) if

preparation may occur a day, a month, or several months before trial, but the purpose remains the same. No investigative or other law enforcement purposes are being pursued, only the need to prepare witnesses for the time they are to give direct testimony from the witness stand.* Thus, petitioner contends the Second Circuit's opinion has incorrectly labeled this use as "non-testimonial", elevating form over substance. Clearly, the functional interpretation should be that information and facts gained from refreshing his recollection were incorporated into the witness' direct testimony and, thus, a use or disclosure of the unsealed tapes or evidence derived therefrom in violation of §2518(8)(a) occurred.

In light of the fact that the sealing requirements goes to the integrity and reliability of evidence, it is hard to believe that Congress intended to permit the use of unreliable evidence to refresh recollection one minute before trial while banning such a use one minute after commencement of trial.** The result of such an interpretation would frequently appear foolish. Further, the court's opinion would lead to several anomalous results. While unsealed tapes could not be used during a grand jury proceeding, as soon as a witness left the grand jury room he could use the same tapes for the purpose of trial preparation. And while the tapes could not be used during

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"evidence derived therefrom" were to be used at trial. *United States v. Caruso*, 415 F. Supp 847, 850 n.2 (S.D.N.Y. 1976). Moreover, since sealing goes to the reliability of the tapes (*Gigante, supra*) and given the time lapse between interception and use, which greatly heightens the suggestive impact of a tape recording or transcript, the case here is far more offensive to the statutory scheme than the use of tapes to obtain probable cause, which secures clearly independent, probative and reliable evidence.

*Petitioner's case is a clear example of non-investigative, trial preparation. Several co-defendants had already been tried. No investigation was under way. The only purpose was to prepare for trial.

**This is virtually the situation presented by this case.

evidentiary hearings on pre-trial motions, the witness could leave the stand and use the tapes to refresh his recollection prior to the commencement of the trial itself.

A second essential ingredient in the reasoning of the Second Circuit was its interpretation of the meaning of the Senate Report analyzing §2517(3) as it applies to this case. The court's opinion states that the reference to *Monroe v. United States*, 234 F. 2d 49 (D.C. 1956), *cert. denied*, 355 U.S. 875 (1957), in the Senate Report No. 1097, 90th Cong. 2d Sess. (1968), quoted in 2 (1968) U.S. Code Cong. Ad. News at 2188-89, was an "approving" reference to a use to refresh the recollection of a witness. Petitioner's position is that this is a misapprehension and misinterpretation of the nature and purpose of the Senate Report for several reasons, which shall be discussed below. The Court should grant a writ of certiorari to correct this error since the interpretation of Congressional intent played a crucial role in the decision. The opinion states that the Report gives rise to "conflicting inferences". The court chose the one it did based on its belief that Congress did not intend to disapprove of, or overrule, *Monroe*. Petitioner contends that further analysis of the Senate Report and the cases cited therein leads to the opposite inference and result.

First, examination of the cases cited in the Senate Report reveals that reference to these cases could not have been for approval of the cases themselves, but only as examples of the uses permitted by §2517(3) once the requirements of that section and the sealing provision in §2518(8)(a) are met. *People v. Saperstein*, 2 N.Y. 2d 210, 140 N.E. 2d 252 (1957), held that evidence procured under the existing New York wiretapping statute was admissible at trial, but this statute was the same one subsequently found unconstitutional by this Court in *Berger v. New York*, 388 U.S. 41 (1967). And, of course, *Berger* was one of the prime reasons for the development of the legislation accompanying the Senate Report. It is hardly likely that the

Senate Report referred "approvingly" to a case whose rationale was overruled by this Court in *Berger*, when Title III was drafted in response to the ruling in *Berger* and *Katz v. United States*, 389 U.S. 347 (1967).*

People v. Hughes, 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1962), permitted impeachment by conversations recorded by a device secreted in a room where all parties to the conversation, other than the accused, were aware of and consented to the recording. The court held that this rule was not so offensive as to render the tape unreliable: "The deception itself does not render the statement inadmissible for it is not of a type reasonably likely to procure an untrue statement." 21 Cal. Rptr. at 670. This analysis would not be necessary under then, as now, existing federal case law analysis of intercepted communications, which holds that such a recording is consensual and admissible for all purposes. *On Lee v. United States*, 343 U.S. 747 (1952). Consensual recordings were also involved in *United States v. Walker*, 320 F. 2d 472 (6th Cir. 1963), thus not raising any issue of interception of telephone communications.

Secondly, reference to *Monroe* itself under § 2517(3) undercuts any notion of an approving reference. The Report lists acceptable uses of evidence "at trial". *Monroe* does not hold that such evidence can be used at trial, rather it holds that use of a tape of a conversation recorded by the witness (who was a participant in the conversation to refresh his recollection prior to testifying was not a violation of §605 of the Communications Act.

The statutory scheme in existence when *Monroe* was decided differs from Title III in several areas, but for the purposes of this petition it is crucial to note that neither the Communications Act nor case law at that time required judicial sealing. §605 operated as an exclusionary device and exclusion under Fourth Amendment principles is

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*See, 2 (1968) U.S. Code Cong. & Adm. News at pp. 2113, 2153.

designed to deter unlawful police conduct in obtaining evidence. It is the manner of interception that is at issue, not the reliability of the evidence obtained. Thus, for example, should a search violate the Fourth Amendment, evidence thus obtained may still be used before a grand jury since the deterrence effect of exclusion would be minimal. *United States v. Calandra*, 414 U.S. 338 (1974).

Very different interests are at stake where sealing is involved. Sealing proscribes certain governmental conduct to insure the reliability of the evidence obtained. Pursuant to §2518(8)(a), that evidence cannot be used for trial purposes without a seal* or a satisfactory explanation for the absence thereof. The statute establishes mandatory, minimum custodial requirements for the safeguarding of recordings of intercepted communications. Evidence which does not meet this minimum cannot be used because it is legally unreliable. *United States v. Gigante, supra.* Improper sealing results in legal unreliability, because these improper or inadequate custodial arrangements violate the core of Title III, preserving the privacy rights of individuals whose communications are intercepted. Therefore, the Senate Report merely makes it clear that use at anytime to refresh recollection is a permissible trial use under §2517(3), as are the uses recognized in the other cited cases. But this is independent of, and does not effect the necessity for, proper sealing as a prerequisite to any such use in a criminal proceeding. §2518(8)(a); 2 (1968) U.S. Code Cong. and Adm. News, *supra.* at 2188-89.

Finally, the Second Circuit's opinion itself can be read as a disapproval of the rationale of *Monroe* (i.e., the witness only repeated what he himself heard at the time of the conversation).

The court's opinion holds that such refreshing of

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*An untimely sealing is the same as the absence of any seal. *United States v. Gigante, supra.* at 506-07.

recollection is a "use" under §2517, albeit nontestimonial and under §2517(2). Further, the court holds that if such a use occurred *during* trial the prohibition of §2518(8)(a) would apply. This leads to the inference, contrary to the rationale in *Monroe*, that "use or disclosure" does occur when a witness' recollection is refreshed. If *Monroe*-type use does fall within §2517(2), as the Second Cicuit holds, then mention of it as acceptable under §2517(3) makes little sense. The framers of the Report could only have regarded any use of wiretap evidence to refresh recollection as being permitted under §2517(3), and therefore requiring compliance with §2518(8)(a).

Petitioner respectfully requests that the Court issue a writ of certiorari to the Court of Appeals for the Second Circuit as that court erred in its interpretation of 18 U.S.C. §§2517 and 2518(8)(a) and the accompanying Senate Report. This misinterpretation has important and substantial consequences for both federal and state criminal justice systems as it involves a central part of the Title III statutory scheme which is binding on both.* This case is to petitioner's knowledge an issue of first impression under the present statute and it is appropriate that the Court grant the writ to correct the Second Circuit's misinterpretation of the proper function of §2518(8)(a) and §2517(3). Petitioner urges that for purposes of trial use (including preparation for trial), unlike investigative uses such as now recognized in *Fury, supra.*, the necessity for sealing should remain. The division between trial and investigation should be drawn according to function, not time. Further, the proper interpretation of the Senate Report should be that use of tapes to refresh recollection for testimonial use is permissible only when the sealing requirement is satisfied.

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*18 U.S.C. §2516(2); *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976).

CONCLUSION

FOR THE ABOVE REASON THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

J. JEFFREY WEISENFELD
Attorney for Petitioner

J. JEFFREY WEISENFELD
STEVEN M. JAEGER
On The Petition

UNITED STATES of America, Appellee,

v.

**Anthony RICCO, a/k/a "Tony Bragiole"
Defendant-Appellant.**

No. 226, Docket 77-1290.

**United States Court of Appeals,
Second Circuit.**

Argued Oct. 5, 1977.

Decided Nov. 30, 1977.

Defendant was charged with conspiracy and possession of cocaine and heroin with intent to distribute. After denying defendant's motion to suppress a prosecution witness' testimony, 421 F. Supp. 401, the United States District Court for the Southern District of New York, Morris E. Lasker, J., entered a judgment of conviction on a jury verdict. Defendant appealed. The Court of Appeals, Friendly, Circuit Judge, held that before trial, an accomplice witness could properly refresh his recollection of various telephone conversations to which he had been a party by listening to tapes of the conversations which had been suppressed because of undue delay in sealing.

Affirmed.

**Criminal Law—394.3
Searches and Seizures—7(10)
Telecommunications—496
Witnesses—255(2)**

Before trial, accomplice witness could properly refresh his recollection of various telephone conversations to which he had been party by listening to tapes of conversations which had been suppressed because of undue delay in sealing. 18 U.S.C.A. §§2517(3), 2518(8)(a).

J. Jeffrey Weisenfeld, New York City, for appellant.

Dominic F. Amorosa, Asst. U. S. Atty., New York City (Robert B. Fiske, Jr., U. S. Atty., S. D. N. Y., Audrey Strauss, and Robert J. Jossen, Asst. U. S. Attys., New York City, of counsel), for appellee.

Before FRIENDLY, GURFEIN and MESKILL, Circuit Judges.

FRIENDLY, Circuit Judge

Anthony Ricco, also known as Tony Bragiole and hereafter referred to as such, appeals from a judgment of the District Court for the Southern District of New York, convicting him on three counts of an indictment. One count charged Bragiole and others with conspiracy to violate the federal narcotics laws, 21 U.S.C. §846; the two other counts charged possession of cocaine in May or June, 1973, and of heroin in October, 1973, with intent to distribute, in violation of 21 U.S.C. §841. Bragiole, one of twelve defendants named in the indictment, had obtained a severance on the ground that another defendant, his nephew Angelo Ricco, would testify on his behalf if Bragiole were to receive a separate trial.

The convictions of Angelo Ricco and two other defendants were affirmed by this court on February 7, 1977, see *United States v. Ricco*, 549 F. 2d 264, *cert. denied*, 431

U.S. 905, 97 S. Ct. 1697, 52 L. Ed. 2d 389 (1977).[1]

The Government's evidence overwhelmingly established that Bragiole entered into a large scale narcotics conspiracy early in 1971 and remained in it until October, 1973, when Peter Mengrone, who had entered the conspiracy earlier in 1973, was arrested by New York State authorities while endeavoring to sell an undercover agent three kilos of heroin supplied by Bragiole and Angelo Ricco. The sole ground of appeal is this: Although the trial judge had suppressed tapes which were the product of New York State authorized wiretaps of Mengrone's telephone on the ground of inexcusable delay in the sealing required by N.Y. Crim. Proc. L. §700.50, *United States v. Ricco*, 421 F. Supp. 401 (1976), he refused to exclude Mengrone's testimony despite the fact that, as the judge's ruling permitted, 421 F. Supp. at 411, the Government had shown Mengrone a transcript of his telephone conversations of October, 1973, a short time before he testified at Bragiole's trial in May, 1977.

The relevant federal statute, 18 U.S.C. §2518(8)(a), provides:

> (8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to

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1. Two other defendants convicted at the first trial did not appeal; another two pleaded guilty. The indictment as to the remaining four defendants was severed. Angelo Ricco did not testify at Bragiole's trial.

> the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. *The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of Section 2517,* (emphasis added)

Subdivision (3) of § 2517 says:

> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.[2]

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2. The New York statute is similar. CPL §700.50 subd. 2 directs that:

> 2. Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions.

Section 700.65 subd. 3 states:

> 3. Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.

An untimely sealing has been held equivalent to the "absence" of the seal required by § 2518(8)(a). *United States v. Gigante*, 538 F. 2d 502, 506-07 (2 Cir. 1976).

Mengrone's direct testimony, in which he gave his own recollection of two conversations that had been intercepted, did not constitute any "Disclosure" of the tapes or the transcripts or of "evidence derived therefrom." While Mengrone was asked twice by defendant's counsel on cross-examination to read transcriptions of suppressed tape recordings to refresh his recollection and impeach his credibility, the defendant cannot complain of that. The defendant's case must therefore rest on the point that § 2518(8)(a) not only prohibits disclosure of improperly sealed tapes but also prohibits their "use." But the "use" prohibited by § 2518(8)(a) is use "under subsection (3) of section 2517," which refers only to disclosure "*while giving testimony* under oath or affirmation in any proceeding held under the authority of the United States or of any State or subdivision thereof." (emphasis added). It does not, by its terms, apply to nontestimonial uses. See *United States v. Fury*, 554 F. 2d 522, 531-32 (2 Cir.), *cert. denied*.—U.S.—, 97 S. Ct, 2978, 53 L.Ed. 2d 1095 (1977). Refreshing a witness' recollection before trial, then, falls not within § 2517(3) but rather within § 2517(2)—use by an investigative or law enforcement officer "to the extent such use is appropriate to the proper performance of his official duties." Here the Assistant United States Attorney used the tapes to refresh the recollection of Mengrone before trial.

Use permitted by § 2517(2) is not subject to the strictures of § 2518(8)(a). It is only after the trial begins that refreshing a witness' recollection falls within § 2517(3) and therefore within the § 2518(8)(a) prohibition. See S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), quoted in 2 [1968] U.S. Code Cong. & Admin. News at pp. 2188-89 and discussed *infra*.

Monroe v. United States, 98 U.S. App. D.C. 228, 235, 236, 234, F. 2d 49, 56, 57, *cert. denied*, 352 U.S. 873, 77 S.Ct. 94, 1 L. Ed. 2d 76 (1956), dealt with a similar issue under § 605 of the Communications Act. That statute provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." In the second *Nardone* case, *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939), the Supreme Court construed this language as prohibiting "use of the proscribed evidence" to obtain otherwise competent testimony. In *Monroe* a police officer had installed a recording device on his own telephone. Declining to decide "the much discussed question whether this constituted an interception within the meaning of the statue," the court held that the Communications Act was not violated in any event since the recordings had not been offered in evidence but had been used by the officer only to refresh his recollection before taking the stand. The officer's testimony, the court said, "was not itself the product of an illegal interception; he repeated on the stand what he himself had heard." 234 F. 2d at 57.

The framers of the interception chapter of Title 18 were aware of the *Monroe* decision. The analysis of § 2517(3) in the Senate Report, S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), quoted in 2 [1968] U.S. Code Cong., & Admin. News at pp. 2188-89, had this to say:

> Paragraph (3) authorizes any person who has received, by any means authorized by this chapter,

> any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with the provisions of the proposed chapter to disclose the contents of that communication or evidence derived therefrom while giving testimony. It envisions, of course, the use and disclosure of such evidence at trial to establish guilt directly (*New York v. Saperstein*, 2 N.Y. 2d 210, [159 N.Y.S. 2d 160,] 140 N.E. 2d 252 (1957), or to corroborate (*United States v. Walker*, 320 F. 2d 472 (6th 1963), or to impeach (*People v. Hughes*, 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1962), a witness' testimony or to refresh his recollection (*Monroe v. United States*, [98 U.S. App. D.C. 228,] 234 F. 2d 49 (1956), certiorari denied, 355 U.S. 875, 78 S.Ct. 114, [2 L. Ed. 2d 79] (1957).

The reference gives rise to conflicting inferences. Although the reference was made in the context of a listing of permitted, not prohibited, disclosures, it could be argued that the framers regarded any use of wiretapped evidence to refresh recollection as being permitted only by § 2517(3) and therefore as being prohibited by § 2518(8)(a) when that section applied. Yet such an interpretation would convert the reference to *Monroe* from an approving to a disapproving one; moreover it would ignore the phrase "at trial" in the second sentence of the quoted extract. We read the report as meaning that when the procedures of the proposed statute were followed, transcripts of intercepted communications might be disclosed at *trial* and also might be there used for the purpose of refreshing recollection although *Monroe* did not involve such use; we do not think Congress meant to overrule the *Monroe* holding that even illegal wiretaps could be used, before trial, to refresh a witness' recollection of his own conversations.

Appellant has made no claim that violation of the statutory requirement for prompt sealing operates retroactively to make an otherwise proper interception of Mengrone's own conversation an illegal search under the Fourth Amendment.[3] No such claim would be sustainable. See *United States v. Burke*, 517 F. 2d 377, 385-86 (2 Cir. 1975) (failure of warrant to require search within 10 days and to direct execution by federal agent and return to federal magistrate held insufficient to require exclusion of seized evidence); *United States v. Amendola*, 558 F. 2d 1043 (2 Cir. 1977) (failure to provide defendant with post-interception notice of placement of pen register on telephone line). See also *United States v. Cafero*, 473 F. 2d 489, 499-500 (3 Cir. 1973), *cert. denied* 417 U.S. 918, 92 S. Ct. 1769, 32 L. Ed. 2d 117 (1974) ("a failure to comply with certain procedural requirements of F.R. Cr. P. 41 has been held not to amount to deprivation of Fourth Amendment rights necessitating suppression"). Cf. *United States v. Donovan*, 429 U.S. 413, 434-435, 97 S. Ct. 658, 671, 50 L. Ed. 2c 652 (1977) (government's inadvertent failure to comply with "discretionary" notice provision of wiretapping statute does not justify suppression of evidence derived from authorized interception); *United States v. Fury, supra*, 554 F. 2d at 529 (failure to comply with statute's "mandatory" notice requirement does not justify suppression of wiretap evidence unless prejudice is shown).

The judgment is affirmed.

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3. As said in appellant's reply brief, p. 2:
The sealing requirement is not a 4th Amendment exclusionary device, but a statutory safeguard designed to indicate the necessary reliability of evidence. . . .

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-eight.

Present: HON. HENRY J. FRIENDLY
HON. MURRAY I. GURFEIN
HON. THOMAS J. MESKILL

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v.-

Anthony Ricco, a/k/a "Tony Bragiole", Angelo Ricco, Charles Indiviglia, a/k/a "Charlie Poops," James Rizzieri, Michael Puglisi, a/k/a "Mike Siciliano," John DiSalvo, a/k/a "Johnny Babear," Anthony Zinzi, Willard Williams, a/k/a "trees", Saint Julian Harrison, a/k/a "Harry", George Corrado, Anthony Spitalieri, a/k/a "Tony from Cleveland," Freddie Blase,

Defendants,

Anthony Ricco,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Anthony Ricco,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-eight.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Anthony Ricco, a/k/a "Tony Bragiole," Angelo Ricco, Charles Indiviglia, a/k/a "Charlie Poops", James Rizzieri, Michael Puglisi, a/k/a "Mike Siciliano", John DiSalvo, a/k/a "Johnny Babear", Anthony Zinzi, Williard Williams, a/k/a "Trees", Saint Julian Harrison, a/k/a "Harry", George Corrado, Anthony Spitalieri, a/k/a "Tony Spits," a/k/a Tony from Cleveland, Freddie Blase,

Defendants,

Anthony Ricco,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the defendant-appellant, Anthony Ricco, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman, Chief Judge

STATUTES CITED

18 U.S.C.

§2510. Definitions

As used in this chapter—

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication:

§2516. Authorization for interception of wire or oral communications

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for

more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

§2518. Procedure for interception of wire or oral communications.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

New York Criminal Procedure Law

§700.65 Eavesdropping warrants; disclosure and use of information; order of amendment.

3. Any person who has received by any means authorized by this article, any information concerning a communication, or evidence derived

therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.